Office-Supreme Court, U.S.
FILED
JUN 11 1985
ALEXANDER L. STEVAS,
CLERK

85- 45

CASE NO: _____

IN THE SUPREME COURT OF THE UNITED STATES

EVERETT T. SANDERS,

PETITIONER

VS.

MISSISSIPPI STATE BAR ASSOCIATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

EVERETT T. SANDERS,

PETITIONER

VS.

MISSISSIPPI STATE BAR ASSOCIATION,

RESPONDENT

/

QUESTIONS FOR REVIEW

1. Whether the imposition of punishment on Petitioner for advising his clients of their constitutional rights against self incrimination violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether the use of inadmissible evidence and the manner in which Petitioner was disciplined violated his right to Due Process secured under the Fourteenth Amendment of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioner, Everett T. Sanders, by and through his attorneys, R. Jess Brown and Solomon C. Osborne, and in support of his Petition for Writ of Certiorari indicates as follows:

CONCISE STATEMENT OF THE GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257.

The date of the judgment sought to be reviewed is March 13, 1985. (Judgment of the Mississippi Supreme Court in Conf. Misc. 171).

CONCISE STATEMENT OF THE CASE

NOW COMES the Petitioner, Everett T. Sanders, by his attorneys, R. Jess Brown and Solomon C. Osborne, and in support of his Petition for Writ of Certiorari, indicates as follows:

On May 19, 1983, R.D. Wade filed a

complaint against Petitioner, Everett Sanders. The complaint alleges that Sanders, the duly elected County Attorney for Claiborne County, was guilty of a gross conflict of interest by representing Bennie Knox, Jimmy Smith, and Roosevelt Yarbrough in a recall proceeding, and advising them to plead the Fifth Amendment in regard to questions involving criminal implications.

Based upon the same facts set out in the complaint filed by R.D. Wade, the accused attorney was indicted. The complaint was held in abeyance, pending the outcome of the criminal proceedings. The trial in the criminal proceedings resulted in a judgment of not guilty.

On January 4, 1984, an investigatory hearing was held before the complaint counsel. The complaints' counsel issued his report on January 20, 1984. In his report, the complaints' counsel concluded

that Petitioner had violated Section 19-23-13 of the Mississippi Code of 1972.

Petitioner appealed the Complaints Committee's determination that he should receive a public reprimand to the Mississippi Supreme Court. The Court affirmed the Complaints Committee's finding based on the evidence presented at the investigatory hearing.

ARGUMENT I.

The imposition of sanctions on Petitioner for advising his clients of their right to avail themselves of their privilege against self incrimination in a civil proceeding is in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Petitioner, while serving as County Prosecuting Attorney, represented three (3) members of the Claiborne County Board of Education before a special tribunal convened for the purpose of determining whether or not a recall election should be conducted wieh , respect to these individuals. County Prosecuting Attorneys are permitted to engage in private civil practice while in office. During the course of the proceeding before the Special Tribunal, Petitioner advised his clients that they had a right to invoke their privilege

against self incrimination in responding to certain questions propounded by opposing counsel. Pursuant to the rendering of this advice, the Complaints Committee of the Mississippi State Bar Association ordered that Petitioner be publicly reprimanded. The Committees' letter of reprimand stated in pertinent part as follows:

> "The Committee on Complaints of the Mississippi State Bar Association has carefully considered the above-captioned complaint and all pertinent material available to it including the report of the Complaints Counsel.
>
> The Committee finds to its satisfaction by clear and convincing evidence that you have been guilty of unprofessional conduct and/or conduct evincing unfitness for the practice of law in the following particulars: Violation of DR 5-105(b) and Section 19-23-13 of the Miss. Code of 1972, (1983 supp.) in that you are guilty of a conflict of interest with your duties as County Prosecuting Attorney for Claiborne County, Mississippi."

Although the Mississippi Supreme Court declined to address the issue head on and sought to resolve this case in another fashion, it did touch on Petitioner's advice to his clients regarding their privilege against self-incrimination. In its opinion, the Mississippi Supreme Court stated inter alia:

> "...The fact that Sanders advised his clients to invoke, and invoked on his clients' behalf, the Fifth Amendment underscores that this removal hearing was pregnant with criminal implications."

The Court, also, stated:

> "Given that it was clearly forseeable that criminal charges against the school board members might well be forthcoming -- as exemplified by the need to invoke the Fifth Amendment -- Sanders should not have undertaken to represent the school board members at the removal hearing."

The discipline of Petitioner is

seemingly predicated upon the theory that advising an individual of his privilege against self-incrimination constitutes the giving of criminal advice and thereby is a violation of both state statute and the code of professional responsibility. The foundation upon which this postulate rests is a characterization of the privilege against self-incrimination as being criminal in nature. This hypothesis ignores or fails to appreciate the historical development and purpose of the privilege. In Ullman vs. United States (1956) 350 U.S. 422, 100 L.Ed. 511, 76 S.Ct. 497, this Court stated:

> "This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrong doers. They to readily assume that those who invoke it are either guilty of crime or commit purgery in claiming the

> privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States."

This Court has also indicated that "The privilege against self-incrimination would be reduced to a hollow mockery if it's exercise could be taken as a equivalent either to a confession of guilt or a conclusive persumption of purgery. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Slochower vs. Board of Higher Education (1956) 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637.

It seems rather clear that the privilege against self-incrimination is a neutral principle. The extent of its availability lends support to this theory as well as dispels any notion of it being criminal in nature. This Court has indicated that the privilege is available "in

any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. Kastigar vs. United States, 406 U.S. 441, 32 L.Ed. 2d 212, 925 Ct. 1653 (1972).

In the case sub judice, Petitioner apprised his clients of the availability of their privilege against self-incrimination. However, Petitioner was ethically required to render this advice to his clients and that such rendition of advice is protected by the United States Constitution. In Maness vs. Myers, 419 U.S. 449, 42 L.Ed. 2d 574, 95 S.Ct. 584 (1975), this Court, commenting on the importance of the role counsel regarding advising a client as to his privilege against self incrimination, stated:

> "The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, could be penalized for advising his client in good faith to assert it. The

assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence...if his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege.

The Maness Court recognized that an attorney has a constitutionally protected right under the Fifth Amendment of the United States Constitution to advise his client of the client's right

to invoke his privilege against self-incrimination. The Court said:

> "We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation. When a witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment."

The right to give advice of the nature rendered in this case is equally protected by the Sixth Amendment of the United States Constitution. It is a well settled principle of law that an individual is entitled to be represented by counsel in both civil and criminal proceeding. This is a right secured by the Sixth Amendment of the United States Constitution. It is rather clear that their right to be represented by counsel implies the right

to have effective representation. It would seem reasonable that "the 'right to be heard by counsel is frustrated equally by denying the right to have counsel present during trial as by preventing counsel, once in the courtroom from giving good-faith professional advice to his client." Maness vs. Myers, supra at 419 U.S. 472. Implicit in the constitutionally protected right of a client to assistance of counsel is the constitutional right of counsel to render advice. Logic could dictate that if the former is to have any efficacy, then right to render advice on the part of the attorney is required. Therefore, Petitioner's advice to his clients regarding the availability of their constitutional privilege against self-incrimination falls within the purview of the Sixth Amendment's protection of an attorney's right to effectively assist

his client. This protection is extended to the states through the Due Process Clause of the Fourteenth Amendment. Powell vs. Alabama, 278 U.S. 45, 77 L.Ed. 158, 535 Ct. 55.

ARGUMENT II.

The manner in which Petitioner was disciplined by the Complaints Committee of the Mississippi State Bar Association was in violation of his right to Due Process as secured by the Fourteenth Amendment of the United States Constitution.

Petitioner had a hearing pursuant to the Complaint that was filed against him claiming that he was guilty of a conflict of interest. An investigatory hearing was conducted wherein heresay and otherwise inadmissible evidence was admitted over the objection of Petitioner. During the course of the investigatory hearing, Ben Piazza, Petitioner's opposing

counsel at the recall hearing, offered the only testimony that attempted to reflect upon an impropriety on the part of Appellant's clients. Mr. Piazza testified that he believed that the individuals represented by Petitioner received kickbacks. This testimony was objected to by counsel for Petitioner. However, it was received over this objection because counsel for the Complaints Committee determined that he wanted to hear the testimony and permitted the witness to continue. Mr. Piazza admitted on cross-examination that he had no personal knowledge of any illegal activities on the part of Petitioner's clients. However, it was this testimony that formed the basis for the Mississippi Supreme Court's conclusion that Petitioner's clients had engaged in illegal activities and that Petitioner's representation was improper. The Mississippi Supreme Court's position is best reflected in the following

dicta:

> "From the record before us, it is clear that the three school board members have a substantial involvement in illegal activities. This is not to say that we find them guilty here; obviously, that would be as inappropriate as it would be unlawful. There does appear probable cause to believe that the laws of the state have been violated. The county attorney on his oath had an obligation of diligent investigation and, if justified, prosecution, in the context of which it is certain that the county attorney had no business representing these persons in any capacity."

A bar disciplinary hearing is quasi-criminal in nature and an accused attorney is entitled to the fundamental requirements of Fourteenth Amendment Due Process, including his Sixth Amendment right of confrontation. In re Ruffalo, 390 U.S. 544, 885 S.Ct. 1222, 20 L.Ed. 117. The evidence relied upon by the Mississippi Supreme Court to formulate its conclusion regarding any misconduct on the part of Petitioner,

is both heresay and incompetent testimony. An admission on the part of the witness that he had no personal knowledge of any wrong doing on the part of Petitioner's clients, should have eliminated his testimony on this issue. The witness conjectures or conclusions should not be of consequence. The record before the Disciplinary Committee of the Mississippi Bar, the Mississippi Supreme Court and this Court does not indicate that Petitioner's clients have been charged or indicted or found guilty of any criminal activity. The reliance by the Mississippi Supreme Court upon inadmissible evidence to formulate the basis for the disciplinary action against Petitioner operates to deprive him of his right to a fair and impartial hearing as guaranteed by the Fourteenth Amendment and his right of of confrontation as guaranteed by the Sixth Amendment as applied through the

Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner, also, contends that the nature of the investigatory hearing employed by the Mississippi State Bar in this case and in general violates an attorney's right to Due Process. The investigatory hearing process permits the introduction of hearsay and otherwise inadmissible evidence. The Complaints Committee utilizes this evidence to determine whether to bring a formal complaint against the accused attorney or to issue an informal private or public reprimand. If a formal complaint issues, then a tribunal is empanel and formal a proceeding is conducted wherein the rules of evidence apply. However, an attorney, as in the case subjudice, receiving a public or private reprimand does not get the benefit of a formal Due Process hearing. He is exposed to the reality of being disciplined without the benefit of

evidentiary considerations. The system of imposing informal sanctions is odious to the concept of Due Process. Petitioner urges upon this Court that he was denied Due Process because the nature of the system prevents such. It is not the possible gravity of the punishment that the accused attorney is likely to receive that triggers his right to Due Process. It is, instead, the mere fact that he is being charged that entitles him to Due Process. Attorneys that are in line to receive private or public reprimands are equally entitled to Due Process protections as those that are in jeopardy of being disbarred.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Honorable Court will grant the Writ requested so that the important questions raised below might be considered in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a true and correct copy of the foregoing Petition for Writ of Certiorari to Honorable J. Kilpatrick, Jr., Complaint Counsel, Mississippi State Bar, P.O. Box 2168, Jackson, Mississippi 39205.

This the 11 day of June, 1985.

R. JESS BROWN

IN THE SUPREME COURT OF MISSISSIPPI

CONF. MISC. NO. 171

EVERETT SANDERS

V.

MISSISSIPPI STATE BAR ASSOCIATION

BEFORE WALKER, P.J.; DAN M. LEE AND ROBERTSON, JJ.

ROBERTSON, JUSTICE, FOR THE COURT:

Members of the bar are not well loved in our society. Lawyer insensitivity to ethical impropriety is one of the primary sources of this lack of public confidence in the Bar. The problem is exacerbated when ethical violations are committed by an attorney holding an important public office.

It is in this context that we consider the recommendation of the Committee on Complaints of the Mississippi State Bar

that Everett Sanders, County Attorney for Claiborne County, Mississippi, be adjudged to have violated the Code of Professional Responsibility of the Mississippi State Bar DR 5-105(B) and Miss. Code Ann. Section 19-23-13 (Supp. 1984), for which a public reprimand has been recommended.

The facts are undisputed. Sanders is the duly elected county attorney for Claiborne County. See Miss. Code Ann. Sections 19-23-1 et seq. (1972). In addition to their public duties, persons holding the office of county attorney may also engage in a private law practice. Sanders has been so engaged in Port Gibson, Mississippi.

The instant bar disciplinary proceeding arises out of the fact that in the course of his private law practice, Sanders undertook representation of three members of the Claiborne County Board of Education: Jimmy Smith, Roosevelt Yarbrough and Benny

Knox. This representation related to proceedings against these three Board members seeking their removal from office. The primary basis of the petition for removal was conduct related to a window replacement project at Addison Junior High School. The school board was said to have paid $200,000.00 for this job, the reasonable value of which was between $40,000.00 and $60,000.00. The remaining $140,000.00 to $160,000.00 was alleged to have been a kickback paid to Smith, Knox and Yarbrough. In the course of this removal hearing the three school board members were asked a number of questions the answers to which may well have led to criminal investigation and prosecution. When those questions were posed, Sanders regularly advised his clients to invoke their Fifth Amendment privilege and decline to answer.

The State Bar Complaints Committee charges that Sanders' representation of

Smith, Knox and Yarbrough on a matter such as this at the time when Sanders occupied the office of County Attorney for Claiborne County constituted a violation of: (1) the Code of Professional Responsibility of the Mississippi State Bar DR 5-105(B) (a rule against conflict of interest), and/or (2) Miss. Code Ann. Section 19-23-13 (Supp. 1984) (forbidding a county prosecuting attorney from defending criminal cases in his county).

Miss. Code Ann. Section 19-23-13 (Supp. 1984) states:

> The county prosecuting attorney shall not represent or defend any person in any criminal prosecution in the name of the state, country or municipality of the county, nor shall he give any advice against the state, his county or in a criminal case against a municipality of his county, and shall not represent any person in any case against the state, his county, or any criminal case arising in a municipal court of his county. Nothing herein shall prohibit any county prosecuting attorney from defending any person in any criminal prosecution in any county not within the circuit

court district of such county prosecuting attorney.

(emphasis added)

DR 5-105(B) of the Code of Professional Responsibility of the Mississippi State Bar states:

> A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

In a nutshell, Sanders is being charged with accepting employment in a civil matter which he full-well knew involved issues and parties that would likely later become the subject of criminal proceedings, for the prosecution of which he would have substantial responsibility. Miss. Code Ann. Section 19-23-11 (Supp. 1984). By representing the accused school board members at the removal hearing, Sanders violated his obligation to the state and to his county to aid uncompro-

misingly in the prosecution of persons for unlawful conduct committed in Claiborne County. See DR 9-101 (avoiding even the appearance of impropriety). Despite the fact that this removal hearing was technically a civil matter, it clearly dealt with a subject matter which may reasonably have been expected to lead to criminal proceedings. It would appear almost inevitable that in the course of such representation Sanders would become privy to client's secrets and confidences which would bear directly upon their guilt in any upcoming criminal proceeding. The fact that Sanders advised his clients to invoke, and invoked on his client's behalf, the Fifth Amendment underscores that this removal hearing was pregnant with criminal implications.

It could be argued that if criminal charges were actually brought against the school board members, Sanders could have

recused himself from such prosecutions and thus avoided the conflict. Sanders would, of course, also need to disqualify himself from defending these school board members or he would run afoul of Section 19-23-13. Nonetheless, even if Sanders managed to avoid such conflict by removing himself completely from any such criminal prosecutions, he would appear to be in violation of DR 5-105(A) which directs that:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

Sanders' acceptance of the defense of the school board members in the civil suit would thus have prevented him from representing a client entitled to his primary allegiance -- the state/county.

Sanders should have been sensitive to this potential future conflict between

his office of county prosecuting attorney and the school board members he defended at the removal hearing because:

> "The attorney's position as an advocate for his clients should not be compromised before, during or after trial." (citations omitted) The ethical duties an attorney owes a client attach at the outset of their relationship. Particularly important when examining joint representation is the lawyer's duty not to disclose his client's confidences or secrets even after the formal termination of that representation.
>
> - State v. Bellucci, 81 N.J. 531, 539, 410 A.2d 666, 670 (1980) (citing State v. Land, 73 N.J. 24, 29, 372 A.2d 297, 300 (1977)).

For various reasons -- such as the dilemma concerning client secrets and confidences -- a prosecutor must be scrupulous in the pursuit of his private law practice. It is elementary that if a party is represented in a civil matter by a prosecutor in his capacity as a private attorney, and if that party subsequently becomes involved in a criminal

matter for which the prosecutor has responsibility, then the prosecutor must immediately withdraw from his representation of the party in the civil matter.

> (The prosecutor) simultaneously exercised legal responsibility as a public prosecutor and as private counsel for (a single individual). (The prosecutor's) dual and diametrically opposed duties to the State and to his client compromised his independent professional judgment. Such conduct is violative of Disciplinary Rules . . . 5-105(B) . . . .
>
> - In The Matter of Lantz, 442 N.E.2d 989, 990 (Ind. 1982); see also In The Matter of Thrush, 448 N.E.2d 1088, 1088-89 (Ind. 1983) (prosecutor must disqualify); cf. United States v. Miller, 624 F.2d 1198, 1199, 1202-03 (3rd Cir. 1980)(former United States Attorney whose office had had responsibility for criminal tax cases must disqualify himself from defending tax fraud defendant).

Furthermore, when a prosecutor engages in private practice concerning a matter which potentially and foreseeably would conflict with his prosecutorial responsibility, he has engaged in improper conduct.

> . . . (The attorney) as permitted by law, he serves as a part-time prosecutor and part-time private practitioner. As a part-time practicing attorney, the (attorney) represented Conren, Inc., which operates as Great Scot Supermarkets, and filed . . . approximately 300 suits seeking . . . damages for bad checks received by Conren, Inc. (The attorney), in his duty as the prosecuting attorney, had public responsibilities with respect to the enforcement of criminal laws, including the prosecution of the drawers of bad checks.
>
> The filing of bad check cases in a private capacity gives the appearance of using the pressure of the public office to collect civil debts for a private client. We find this conduct violative of . . . Disciplinary Rule 5-105(B), which prohibits a lawyer from engaging in multiple employment where independent professional judgment in behalf of one client is likely to be adversely affected by representation of another client. . . .
>
> - In The Matter of Lantz, 420 N.E. N.E.2d 1236, 1237 (Ind. 1981).

Given that it was clearly foreseeable that criminal charges against the school board members might well be forthcoming -- as exemplified by the need to invoke the Fifth

Amendment -- Sanders should not have undertaken to represent the school board members at the removal hearing.

We find it disquieting that it has become necessary to address this point, but so that there will be misunderstanding hereafter we have advised Sanders and the other county attorneys of this state that one client has first and unqualified call upon their time and their fidelity. That client is the county which each voluntarily has sought to serve and been elected to represent. The particular interest of a county that the county attorney is charged to protect is that arising from the public necessity of securing compliance with the laws respecting high crimes and misdemeanors. Miss. Code Ann. Section 19-23-11(Supp. 1984) The county attorney must be diligent and alert to investigate and ferret out wrongdoing and, in cooperation with the district attorney, mount prosecutions where

appropriate. In this regard, the county attorney must represent his primary client with warm zeal and all good fidelity.

From the record before us, it is clear that the three school board members have a substantial involvement in illegal activities. This is not to say that we find them guilty here; obviously, that would be as inappropriate as it would be unlawful. There does appear probable cause to believe that the laws of the state have been violated. The county attorney on his oath had an obligation of diligent investigation and, if justified, prosecution, in the context of which it is certain that the county attorney had no business representing these persons in any capacity.

If the county attorney wants to draft wills, form corporations, negotiate contracts, or bring personal injury actions -- or whatever -- he is perfectly

free to do so, provided he does not compromise his fidelity to his primary client as provided by law. Miss. Code Ann. Section 19-23-11 (Supp. 1984). This means that a county attorney may not, consistent with our laws regulating his office and the Code of Professional Responsibility to which he is subject, represent in any way, shape, form, or fashion any person or firm which has been, is or may potentially be subject to investigation for wrongdoings. The only advice the county attorney may ethically give such persons is to get another lawyer.

The Committee on Complaints for the Mississippi State Bar opinion that "a public reprimand of . . . (Sanders) is all that justice requires". The Committee also assessed Sanders that actual and reasonable necessary cost of the investigation. This degree of punishment is consonant with that meted out in similar situations. In The Matter

of Thrush, 448 N.E.2d 1088, 1089 (Ind. 1983); In The Matter of Lantz, 442 N.E.2d 989, 990 (Ind. 1982); In The Matter of Lantz, 420 N.E.2d 1236, 1237 (Ind. 1981). Such punishment would also appear adequate to achieve the salutary purpose of informing the other prosecutors of the seriousness of this violation.

Having in mind our role in matters such as this, see, e.g., Levi v. Mississippi State Bar, 436 So.2d 781, 782-784 (Miss. 1983), we here adjudge that Everett Sanders has engaged in conduct which violates both DR 5-105(B) and Miss. Code Ann. Section 19-23-13. We order that Sanders be publicly reprimanded in the manner provided by law and that he pay all costs of these proceedings.

ATTORNEY ADJUDGED GUILTY OF CONFLICT AND INTEREST ORDERED PUBLICLY REPRIMANDED AND TO PAY ALL COSTS.

PATTERSON, C.J.; WALKER, P.J.; ROY NOBLE LEE, P.J.; HAWKINS, DAN M. LEE, PRATHER, SULLIVAN AND ANDERSON, JJ., CONCUR.